STATE OF WISCONSIN CIRCUIT COURT SAWYER COUNTY

STATE OF WISCONSIN,

Plaintiff,

v. Case No. 04-CF-141

CHAI S. VANG,

Defendant.

STATE'S REPLY TO DEFENDANT'S MOTION TO DISMISS COUNT NINE AS MULTIPLICITOUS

INTRODUCTION

The state filed an Information charging the defendant, Chai S. Vang, with six counts of first-degree intentional homicide while using a dangerous weapon and three counts of attempted first-degree intentional homicide while using a dangerous weapon. Both Count Four and Count Nine of the Information specifically allege that Vang attempted to kill Lauren Hesebeck.

The Complaint itself alleges that Vang shot at Hesebeck on two separate occasions. Initially, Vang shot at him three times, striking him in the shoulder with the third shot. Vang fired at Hesebeck shortly after firing the shots that struck and injured Terry Willers, and struck and killed Dennis Drew and Mark Roidt. Criminal Complaint ('Complaint') at ¶¶ 8 and 11. Hesebeck stated that he then heard shots in the area where officers found Robert Crotteau and Joe Crotteau. Joe Crotteau's body was found approximately 467 feet from the site where the initial shootings occurred. Complaint at ¶ 12. Meanwhile, Hesebeck used a walkie-talkie to summon aid. Carter Crotteau and Brandon Willers arrived on an ATV and transported Dennis Drew, who had not yet succumbed to the fatal wounds, from the area. Complaint at ¶ 14. Carter

Crotteau, Brandon Willers, and Dennis Drew then returned to the cabin, passing an ATV with Alan Laski and Jessica Willers traveling in the opposite direction toward Hesebeck and Terry Willers. En route, Vang allegedly shot Laski and Jessica Willers as they passed him in the woods. Complaint at ¶ 15. Hesebeck heard additional shots as the second ATV approached. He then observed Vang approach the area. Vang shot at Hesebeck and Hesebeck then returned gunfire. Complaint at ¶ 17.

The defendant, Chai S. Vang, has moved the court for dismissal of Count Nine in the Information asserting that it is multiplicitous. As the state will demonstrate below, Counts Nine and Four are not multiplicitous.

ARGUMENT

THE INFORMATION IS NOT MULTIPLICITIOUS BECAUSE COUNTS FOUR AND NINE RELATE TO TEMPORALLY SEPARATE AND DISTINCT ACTS

Multiplicity arises when the state charges a defendant with more than one count for a single offense. Multiplicitious charges are impermissible because they violate an individual's constitutional right to be free from double jeopardy. *State v. Davison*, 2003 WI 89, ¶ 34, 263 Wis. 2d 145, 666 N.W.2d 1.

Courts employ a two-prong test to analyze multiplicity challenges: (1) Are the charged offenses identical in law and fact? and (2) Did the legislature intend multiple offenses to be charged as a single count? *State v. Derango*, 2000 WI 89, ¶¶ 28-30, 236 Wis. 2d 721, 613 N.W.2d 833.

If the offenses are identical in both law and fact, then they are multiplicitous and violate double jeopardy. *Id.* at ¶¶ 28-30. Charges are identical in law if they arise under the same statute. Even if the charges are identical in law, the question then becomes whether they are

identical in fact. Charges are not identical in fact if they are separate in time or significantly different in nature. *State v. Schaefer*, 2003 WI App 164, ¶ 45, 266 Wis. 2d 719, 668 N.W.2d 760. The time element

> does not turn on the number of seconds or minutes between the alleged criminal acts. . . . Rather, this factor looks to whether the defendant had sufficient time for reflection between the acts to re-commit himself to the criminal conduct. . . . Similarly, charged offenses are of a significantly different nature when, despite being the same type of act, they evince 'a new volitional departure in the defendant's course of conduct.'

Id. at ¶ 46 (citations omitted). "When a defendant complains prior to trial that criminal charges improperly split a single crime into multiple counts because the alleged factual basis does not show a 'new volitional departure,' the pertinent question is whether the facts alleged by the State, and reasonable inferences from those facts, demonstrate a new volitional departure." *Id.* at ¶ 52.[1]

For example, in *Harrell v. State*, 88 Wis. 2d 546, 277 N.W.2d 462 (Ct. App. 1979), the state charged Harrell with two counts of sexual assault, occurring approximately 25 minutes apart, involving the same victim and same location. Because there was a sufficient break in time between the incidents, the two counts were not multiplicitous. *Id.* at 564-66. Likewise, in *Koller*, the state charged three counts of sexual assault for different sex acts occurring almost continuously, over a short time period. The *Koller* court found that these charges were not multiplicitous because they were plainly different in nature and involved new 'volitional departure,' regardless of the time that had passed. *Koller*, 248 Wis. 2d at ¶ 24.

[1]This language in *Schaeffer* represents a modification of the language in *State v. Koller*, 2001 WI App 253, ¶ 31, 248 Wis. 2d 259, 635 N.W.2d 838, a decision that Vang relies upon in support of his argument.

A court should not reach the second prong of the multiplicity test unless the court concludes that the charges are different in fact and law. *Schaefer*, 266 Wis. 2d at ¶ 44. This second question is a question of statutory interpretation rather than a constitutional inquiry. Its focus is to discern the legislative intent as to the allowable units of prosecution. *State v. Trawitzki*, 2001 WI 77, ¶ 22, 244 Wis. 2d 523, 628 N.W.2d 801. Should a court find that the charges are different in fact, it must presume that the Legislature intended multiple punishments for the conduct. The defendant may rebut this presumption by showing a clear legislative intent to charge multiple offenses as a single count. *Schaeffer,* 266 at ¶ 54; *Derango*, 236 Wis. 2d at ¶¶ 28-30. In discerning legislative intent for a multiplicity challenge, a court should consider: (1) statutory language; (2) legislative history and context; (3) the nature of proscribed conduct; and (4) the appropriateness of multiple punishments. *State v. Swinson*, 2003 WI App 45, ¶ 33, 261 Wis. 2d 633, 649, 660 N.W.2d 12.

Applied here, this court must first determine whether Count 4 and Count 9 are identical in law and fact. Count 4 and Count 9 both allege that Vang attempted to commit first-degree intentional homicide while using a dangerous weapon. As such, these counts are identical in law. However, they are not identical in fact. Here the Complaint describes two distinct instances in which Vang discharged his SKS rifle at victim Lauren Hesebeck. During the first incident, Vang turned and fired his weapon striking Willers, Drew, and Roidt. Vang then fired three shots at Hesebeck as Hesebeck attempted to shield himself with the ATV. Vang's third shot struck Hesebeck in the shoulder as Vang stood over Hesebeck. Vang then shot Robert Crotteau, and pursued Joe Crotteau, mortally wounding him over 450 feet from the scene of the initial attack. Vang then had time to reverse his jacket, reload his weapon, observe a rescue party summoned in response to Hesebeck's walkie-talkie call which removed Drew from the area, and

then fatally shoot in the back the second responding rescue party of Jessica Willers and Alan Laski as they responded on an ATV. Only then did Vang return to the area of the original shooting and realize that he had not killed Hesebeck and Terry Willers. At that time, Vang fired and Hesebeck returned fire, whereupon Vang fled the area.

Here, the conduct is separated in time and different in nature. At a minimum, many minutes passed between Vang's decision to fire three shots at Hesebeck and his return to Hesebeck's location and shoot at him on a second occasion. In addition, there were several intervening events between the two shooting incidents: he departed the area in pursuit of Joe Crotteau. He fatally wounded Joe Crotteau, Jessica Willers, and Al Laski. He reversed his jacket. He reloaded his weapon. He returned to the ATVs where he had initially shot at Hesebeck. In sum, his decision to attempt to kill Hesebeck on this second occasion is separate and distinct from the first effort. It constitutes a new volitional departure in the defendant's course of conduct.[2] Said another way, Vang had sufficient time to reflect between his assaultive acts against Hesebeck to again commit himself.

Turning to the second prong, Vang has offered no evidence that the Legislature intended that attempted first-degree intentional homicides should be prosecuted as a single count when they involve separate, distinctive acts with intervening circumstances between them. As such, he has not met his burden on his multiplicity challenge.

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[2]In contrast, Vang might well have a multiplicity claim if the state had charged him with a separate count for each of the three shots he fired in rapid succession at Hesebeck during the initial confrontation. Under these circumstances, Vang might more credibly argue that he did not have sufficient time for reflection between the acts.

CONCLUSION

For the above reasons, Count 4 and Count 9 alleging that defendant intended to kill Hesebeck are not multiplicitious. As such, the state respectfully requests this court to dismiss defendant's motion on this claim.

Dated this 10th day of May, 2005.

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